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JAMES H. McKENNEY,
Clerk

Brief of Peck, in the Cary v Hanson

Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

Petitioners.

Filed March 6, 1899

THE HUNTTING ELEVATOR COMPANY, *Petitioner*, } No. 285.

THE HUNTTING ELEVATOR COMPANY, *Petitioner*, } No. 284.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Petitioner*, } No. 283.

vs.

C. H. BOSWORTH, Receiver of the Chicago, Peoria & St. Louis Railway Company.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR PETITIONERS.

GEORGE R. PECK,
GEORGE P. CARY,
SOLICITORS FOR PETITIONERS.

BURTON HANSON,
OF COUNSEL.

EXPLANATORY NOTE.

Reference is made to the Record in the Rau case only, for the reason that the Record in the cases of the Huntting Elevator Company and the Chicago, Milwaukee & St. Paul Railway Company are the same as in that case.

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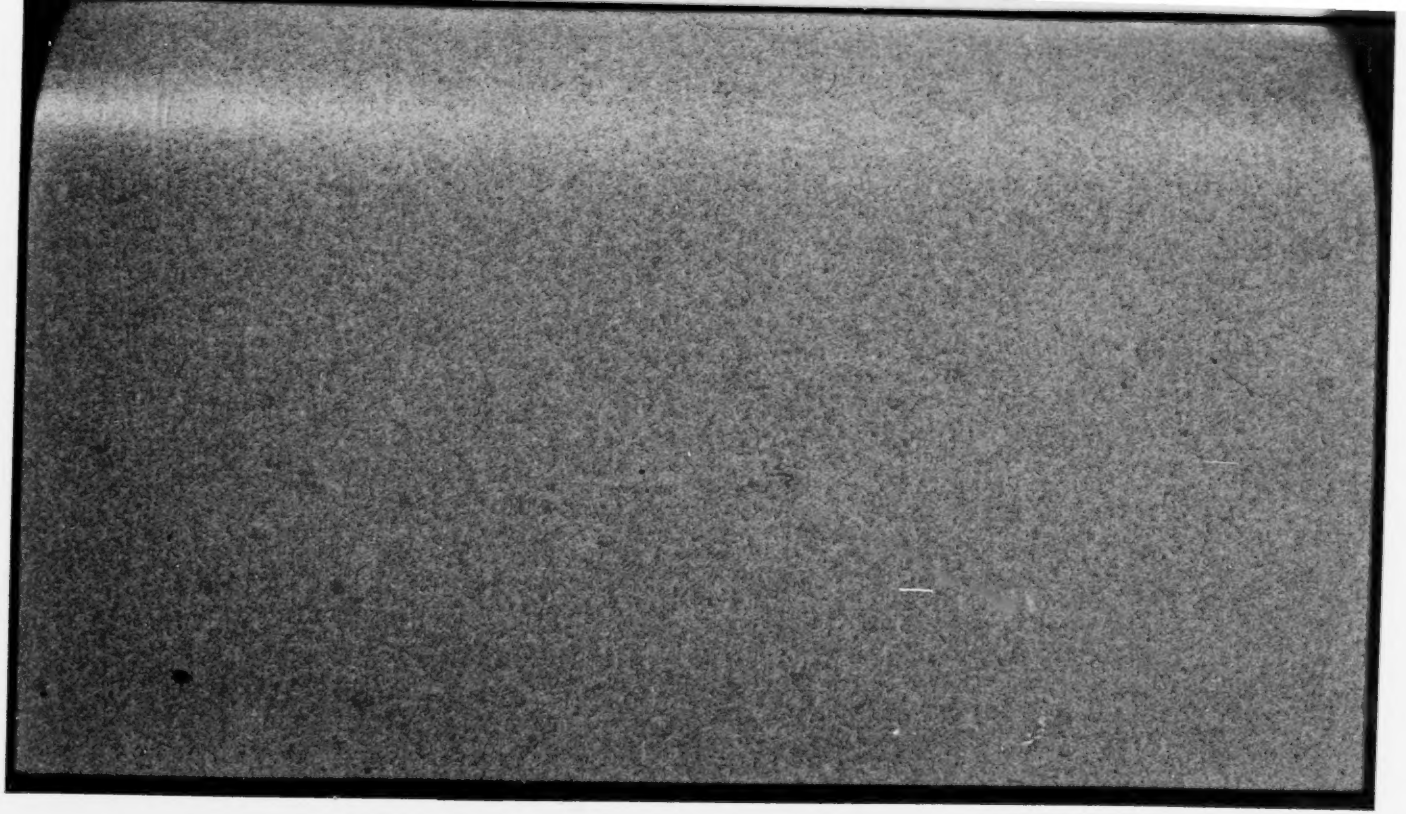

IN THE

Supreme Court of the United States.

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JACOB RAU, *Petitioner,* — No. 285.

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vs.

C. H. BOSWORTH, Receiver of the Chicago, Peoria & St. Louis Railway Company.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

STATEMENT OF THE CASE.

On the evening of the 28th day of October, 1894, fifty-nine cars and their contents were either damaged or destroyed by fire at East St. Louis, in the State of Illinois, while, as petitioners claim, they were in the possession of the Receiver of the Chicago, Peoria and St. Louis Railway Company. Fifty-four of these cars belonged to the Chicago, Milwaukee and St. Paul Railway Company, thirty-eight of which were wholly destroyed—the amount

of the damage being, as stipulated between the parties, $9,033.73. The remaining sixteen cars were repaired by the Receiver and no claim for damage is made as to them. These proceedings were instituted for the purpose of recovering the value of the thirty-eight cars which were destroyed and the value of the contents (which was barley) of the whole fifty-nine cars.

The petitioners base their right to recover on the ground that the cars and the barley they contained at the time they were destroyed by fire were in the possession of the Receiver and that he negligently allowed them to stand or be stored on tracks near by a long wooden warehouse that was filled with loose hay through and into which locomotive engines were constantly pasing and repassing, which warehouse taking fire was itself consumed, along with said cars and their contents. (Rau Rec., 20, 22, 43.) *This warehouse is characterized by the Receiver in his answer as "a veritable fire trap."* (Rau Rec., 23.)

The matters in dispute were referred to Mr. Stuart Brown, one of the masters in chancery of the United States Circuit Court for the Southern District of Illinois, and after hearing the proof and arguments of the parties, he reported in favor of the petitioners. *For his reports, see Rau Record, pp. 53–63; Huntting Elevator Record, pp. 5 and 6; Chicago, Milwaukee and St. Paul Railway Company Record, pp. 5 and 6.* Subsequently the proceedings came before the court upon exceptions taken by the Receiver to the reports of the master, and the exceptions were overruled, the reports confirmed and decrees entered thereon in favor of the petitioners, as follows:

1.	Chicago, Milwaukee and St. Paul Railway Company	$9,033 73
2.	S. Y. Hyde Elevator Company	2,154 53
3.	Huntting Elevator Company	2,600 95
4.	Thomas McMichael & Son	3,169 24
5.	W. W. Cargill Company	1,253 23
6.	Jacob Rau	1,144 07
7.	Henry Rippe	1,165 67
8.	Gilchrist & Co	805 00

Appeals from these decrees were taken by the Receiver to the United States Circuit Court of Appeals for the Seventh Circuit, whereupon the decrees were reversed and the causes remanded with directions in each case to dismiss the petition, Circuit Judge Jenkins dissenting, and Circuit Judges Woods and Showalter each disagreeing with the other as to the reasons upon which the reversals were ordered. The cause is reported in 30 U. S. Cir. Ct. App., 541. Thereupon petitioners made application to this court for writs of *certiorari*, which were granted. By agreement of the parties, the decrees in favor of the S. Y. Hyde Elevator Company, Thomas McMichael & Son, W. W. Cargill Company, Henry Rippe, and Gilchrist & Co. abide the result of the Rau and Huntting Elevator Company cases. The only respect in which the Rau and the Huntting Elevator cases differ is that the ownership of the barley is conceded in the former and denied in the latter.

The claims in both the Rau and Huntting Elevator Company cases arise out of the destruction of a large quantity of barley by fire at East St. Louis, while in transit, which barley was consigned from points in Iowa, Wisconsin and Minnesota to St. Louis, Missouri, by way of East St. Louis. THE DESTINATION OF ALL

THE BARLEY SHIPMENTS WAS ST. LOUIS, MISSOURI. *This was agreed upon by a written stipulation of the parties.* (Rec., 31-34.)

The claim of the Chicago, Milwaukee and St. Paul Railway Company arises out of the destruction by the same fire of thirty-eight box freight cars in which the barley above mentioned was being transported at the time it was destroyed.

As the cases are now presented to this court, the principal question involved is: Were the cars and their contents at the time they were destroyed in the possession of the Receiver of the Chicago, Peoria and St. Louis Railway Company, or had they been delivered by him to the next succeeding carrier, the Terminal Railroad Association of St. Louis? The petitioners claim that they had not been so delivered, but were in the possession of the Receiver, while the Receiver contends that he had made a delivery of them to that association before the fire had occurred. The master to whom the cases were referred, District Judge Allen, who presided at the Circuit, and Circuit Judge Jenkins, sitting in the Circuit Court of Appeals, held that there had been no delivery of the cars by the Receiver to the Terminal Association, and that he was liable for their value and contents, while Circuit Judges Woods and Showalter held that there had been a delivery of the cars by the Receiver to the Terminal Association, but each disagreed with the other as to the reasons therefor.

The case presented by the record is this: The barley in question was delivered to the Chicago, Milwaukee and St. Paul Railway Company in cars of that company at various points in Iowa, Wisconsin and Minnesota consigned to commission houses at St. Louis, Missouri, by

way of East St. Louis. In due course of transportation, the cars and their contents were delivered to Bosworth as Receiver of the Chicago, Peoria and St. Louis Railway Company at Peoria, Ill. This company operated a line of railroad from that place to East St. Louis in Illinois. The cars were transported by the Receiver's company to East St. Louis, the terminus of that line of railroad, and there with their contents were destroyed by fire as above stated. Having no terminal facilities whatever of its own at East St. Louis, the Receiver entered into a contract with the Terminal Railroad Association of St Louis whereby that association undertook and agreed to furnish him necessary yard room, track facilities, switch engines and cars for handling his business, making and breaking up his trains that arrived at and departed from that place, *and storage room for a reasonable number of cars, not exceeding 150 at any one time.* Under this arrangement, so much of tracks numbered from 40 to 50 as was necessary to give the Receiver storage room for that number of cars, was set aside for his use. (Rau Rec., 70, 74, 75, 76, 77.) The agreement will be found on page 100 of the record. These tracks were the tracks that were commonly and usually used by the Receiver for handling and storing his cars and upon which they were placed upon their arrival at East St. Louis, *and where they remained standing until they were delivered to the Terminal Association for further transportation*, or some other disposition had been made of them. (Rec., 70, 73, 74, 77, 187, and stipulation, subdivision 2, Rec., 103, 104.) AND THESE WERE THE TRACKS UPON WHICH THE CARS IN CONTROVERSY WERE STANDING AT THE TIME THEY AND THEIR CONTENTS WERE DESTROYED BY FIRE. (Rec., 74-77, and subdivision 2, stipulation, Rec., 103, 104.)

The practice under this agreement was that upon the arrival at East St. Louis of the Receiver's trains, they would come to a stop at the end of his track, and there they would stand until a switch engine of the Terminal Association would hitch to them and switch them to some one or more of the ten tracks which the Receiver had the use of under his agreement with that association. For this service the Receiver paid the Terminal Association fifty cents a car. After having been switched to these tracks, the cars would remain there until the Receiver gave directions to the Terminal Association for their further movement or transportation, if the cars were to be further transported by that association. If they were destined to St. Louis or to points beyond, by way of the Terminal Association, the Receiver would make out a manifest, called a way-bill, which contained on its face the name of the consignor and consignee, the route and destination and number, name and contents of the car, and deliver that to the agent of the Terminal Association and take his receipt therefor. Thereupon, *and not until then*, the switching crew of the Terminal Association would take the way-bill, take the cars named therein out of the Receiver's portion of the yard, and place them in its portion of the yard, put them in a train and take then to the destination indicated in such way-bill. If the cars were routed by some other line than that of the Terminal Association, such as the Wiggin's Ferry, a competing line, they would be switched by the Terminal Association from the tracks which the Receiver used under this agreement with that association, to the tracks of the Ferry Company. This service was performed under the agreement with the Terminal Association. (*See fourth subdivision of the agreement.*) The

manner in which the Receiver's cars were handled after their arrival at East St. Louis is probably best told by the witnesses themselves. They are George H. Felps, agent of the Terminal Association; W. H. Calvert, agent of the Receiver at East St. Louis, and E. R. Stapleton, his clerk, and the Receiver himself.

Geo. H. Felps testified as follows:

Q. What company breaks up this train and places the cars on the tracks marked red?

A. The Terminal Railroad Association.

Q. That done under the agreement introduced here?

A. Yes, sir; at a certain sum per car.

Q. What sum?

A. Fifty cents a car.

Q. When that train is broken up, as you have stated, and the cars set on the tracks marked red, what is then done with these cars?

A. We are done with the cars then until we get way-bills from the agent of the C. P. & St. L.

Q. From the Receiver?

A. Yes, sir; from the agent of the Receiver.

Q. What is a way-bill?

A. A manifest showing what disposition is to be made of the freight.

Q. When you receive the way-bill of a car what do you do then?

A. Card that car out, and our yardmen are instructed to switch it out and deliver it according to the instructions.

Q. Does the way-bill contain the number of the car and destination?

A. Yes, sir; consignee, destination and route.

Q. *When you receive this way-bill and switch the car out, where do you take it?*

A. *Take the car out of their yard—their portion of the yard, and place it in the train in our portion of the yard and take it to the connection or destination indicated.* (Rau., Rec, 74, 75.)

And further, at page 78, he testified:

Q. What was the custom in respect to handling these

cars set out on these tracks, after they had been set there, on the part of the Terminal Association?

A. *We had nothing to do with them at all until we received way-bills, if they stood there till doomsday.*

E. R. Stapleton, witness for Receiver, testified as follows:

Direct Examination.

Q. A train comes in on this "Y"—what is then done with it by the Receiver, if anything?

A. The trains stop on the "Y" and the Receiver is done with them.

Q. Is that true?

A. Yes, sir; the Receiver does not handle the cars or control their handling in a *direct* way after that. (Rau Rec., 184.)

Cross-Examination.

Q. The major asked if the Receiver was done with them, so far as handling the cars?

A. So far as the handling of the cars.

Q. *The Receiver did have something else to do with them with reference to sending them on to St. Louis in the way of giving way-bills?*

A. Yes, sir; giving way-bills.

Q. When those way-bills are made out by the agent at East St. Louis they are delivered to the Terminal Association?

A. And their receipt taken.

Q. Of the way-bill?

A. Yes, sir.

Q. So you would have the receipt of every way bill delivered?

A. Yes, sir.

Q. Then the Terminal Association would take these cars according to the direction on the way-bill?

A. Yes, sir. (Rau Rec., 188, 189.)

W. H. Calvert, a witness for Receiver, testified as follows:

Q. When way-bills were made out by the Receiver at

East St. Louis for barley consigned to St. Louis and other points to which the Terminal Association was to take it, where were the way-bills made out—at your office?

A. Yes, sir.

Q. That would be way-bills of all cars going to some other points than East St. Louis?

A. Yes, sir; except such as were to go to Wiggins Ferry, in which case the way-bills would be delivered to the Wiggins Ferry. (Rau Rec., 234.)

C. H. Bosworth, the Receiver, testified as follows:

Q. Isn't it a universal custom whenever there is a car delivered from one company to another, consigned to a point beyond, before that car is taken by the company to which it is delivered and moved on to its destination, a way-bill accompanies that car and is delivered to the receiving company?

A. I can't say it is a universal custom.

Q. How would the receiving company know what to do with a car without a way-bill?

A. Might take the directions of the agent; *I will state it is undoubtedly generally the case.* (Rau Rec., 227.)

The Receiver also testified that until the Terminal Association received a way-bill it would not undertake to move any of his cars, excepting to switch them from his main track to the tracks which he used under the agreement with that association, and that until his agents delivered way-bills to the Terminal Association, the cars were subject to his (the Receiver's) orders. (Rau Rec., 228.)

NO WAY-BILL HAD BEEN DELIVERED TO THE TERMINAL ASSOCIATION FOR ANY OF THE CARS IN CONTROVERSY. (Rau Rec., 78, 96, 133.) Indeed, it is not claimed by the Receiver that he had delivered a way-bill to the Terminal Association for any of the cars in question

The testimony also shows, and it is undisputed, that at

East St. Louis whenever the Receiver delivered a car of any other than his own company to the Terminal Association, immediately upon such delivery being made he would send by mail a written notice called a junction report, to the company whose car was delivered, notifying it of the delivery, so that the car delivered would be credited to him and charged to the Terminal Association. For illustration: Whenever the Receiver delivered a car belonging to the Chicago, Milwaukee and St. Paul Railway Company to the Terminal Association he would immediately, on the very day of the delivery of the car, send a junction report to the car accountant of that company notifying him of the delivery of such car to the Terminal Association; thereupon the car so delivered would be credited to the Receiver as having been delivered to the Terminal Association and charged to that association. This is the custon at all junction points and is adopted by the railways of the country in order to enable them to know the whereabouts of their cars and to fix the responsibility of the company having the possession of them in the event of loss or damage. NO JUNCTION REPORT HAD BEEN SENT BY THE RECEIVER TO THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY FOR ANY OF THE CARS IN CONTROVERSY. (Rau Rec., 80, 81, 82, 87, to 93, 138, 139, 140, 227.)

It further appears from the record that under the custom which existed at East St. Louis in reference to handling the barley business of the Receiver, after cars containing barley had been placed upon the tracks which the Receiver had the use of under his agreement with the Terminal Association, his agent would take the way-bills which had come into East St. Louis with the cars and under which the cars had been transported over his line

of road, which way-bills contained on their face the name of the consignor, consignee, number, destination and contents of the car, and notify "*the consignee that we (the Receiver) had a car No. so and so, loaded with barley; where do you want it?*" (Rau Rec., 190.) In due time, this notice which the *Receiver's agent* had sent to the consignee, the consignee would send back to the *Receiver's agent* endorsed on the back with directions where the car should be sent. *This was done under an arrangement between the consignees of this barley and the Receiver, that he would hold their barley at East St. Louis subject to their order*—so the Receiver's agent testified:

Q. Was that a different and separate transaction having reference to the original contract between the shippers and the C., M. & St. P.? *Was it a new arrangement the consignee directed and controlled*, or was it the original arrangement named by the shipper?

A. *A new arrangement by the consignee who placed orders with* us *to hold his barley.* (Rau Rec., 190.)

Upon receiving directions from the consignee the Receiver's agent would make out a way-bill containing the name of the consignee, the destination, number and contents of the car, take it to the agent of the Terminal Association, deliver it to him and take his receipt. Until this way-bill was received the Terminal Association of course had no knowledge concerning these cars further than it had switched them from the main line of the Receiver's road to the tracks which he had the use of under the aforesaid agreement, and had earned in consequence a certain amount, depending on the number of cars switched. It did not and could not know until this way-bill was received that the cars of the Receiver standing on such tracks contained barley, nor what they contained, or that they were destined to St. Louis, or to some other point,

and if so, where or to whom, or by what route they were consigned. Upon the receipt of this way-bill from the Receiver's agent the agent of the Terminal Association would give directions to the switching crew, and they would take the car named in the way-bill out of the Receiver's portion of the yard and place it in the Terminal Association's portion of the yard, put it into a train, and then take it to the destination or connection indicated in the way-bill. (Rau Rec., 74.)

It further appears from the record that the Receiver made no proof of having ever sent to the consignees of the barley in question the usual and customary notice of the arrival of any of the cars in controversy, and so far as the record shows, no notice was given by the Receiver to the consignees of the arrival of the barley at East St. Louis.

The master to whom these causes were referred found as a fact that no notice of the arrival of the barley at East St. Louis had been given to the consignees, as it was the custom to do; that no way-bill had been delivered by the Receiver to the Terminal Association for any of the cars in controversy, as it was the custom to do when a car was delivered to that Association, and that no junction report had been sent by the Receiver to the Chicago, Milwaukee and St. Paul Railway Company, as it was the custom to do when a car of that Company had been delivered to the Terminal Association. (Rau Rec., 54, 61; Huntting Elevator Co. Rec., 12, 13; C., M. & St. P. Ry. Co. Rec., 5.)

It further appears from the record that after the fire had occurred the Receiver presented proofs of loss to the insurance companies in which he held policies, and that Calvert, his agent at East St. Louis, by his direction prepared a sworn statement showing the cars and the

value of their contents which were destroyed by fire, and that he, the Receiver, presented that statement to the insurance companies for the purpose of collecting the insurance thereon, and so far as the record shows did collect such insurance. The proofs of loss, among other things, contained the following:

"During the night of October 28, 1894, a fire occurred on the tracks of the Terminal Railway Association at East St. Louis, State of Illinois (*said tracks being used by the Chicago, Peoria and St. Louis Railway Company*), and burned the cars and wholly consumed the property and freight in transit in said cars, as set forth in the statement attached hereto and forming a part of this proof of loss." (Rec., 88, 98, 163, 164.)

This statement shows, as does the whole testimony, that these cars, instead of having been delivered to the Terminal Association, were at the time the fire occurred upon the tracks used by the Receiver, and as between him and the petitioners were his tracks; consequently the cars were in his possession while they were standing thereon, especially when no way-bill had been delivered by the Receiver to the Terminal Association for any of such cars, as was the custom whenever a delivery of cars was made to that association.

After the foregoing facts had been shown in evidence, counsel for Receiver stated that he had not been able to obtain the testimony of the consignees, as he had expected, and therefore asked for further time, stating *that he expected* to prove by them that the Terminal Association as an inducement to the consignees to ship their barley by that route, agreed to hold the cars containing barley free of car service charges *upon its tracks* at East St. Louis. To avoid further delay, counsel for petitioners admitted that if the persons named were present

they would testify substantially as counsel *stated he expected they would testify.* (Rau Rec., 238–241.) It is apparent that the admission of counsel was made upon the assumption that this arrangement, if it existed, became operative only *after* the cars had been delivered into the possession of the Terminal Association, so that they could be said to be on *its* tracks and in *its* yards, and that delivery could not be said to have been made until the agent of the Receiver had delivered to the agent of the Terminal Association the customary way-bill, containing the names of the consignor and consignee, the route and destination, and the number and contents of the car, and taken the receipt therefor, as it was the custom to do. For until this had been done the Receiver had not parted with either the possession or control of the cars, and the Terminal Association could not know which of the cars that were standing on the tracks which the Receiver used were routed over its tracks, and if so, what they contained, where they were destined or to whom consigned; and until this information is received the Terminal Association would not as a matter of course accept delivery. And such delivery not having been made of any of the cars in controversy the arrangement which counsel stated he *expected* to prove had no application to this case.

Rulings of the Court Below.

Judge Showalter in his opinion holds that the moment the switch engine of the Terminal Association was coupled to the Receiver's train for the purpose of switching the cars from his main line to the tracks which he used under his agreement with the Terminal Association the Receiver's liability ceased and that of the Terminal Association began. (Rau Rec, 355.)

Judge Woods held that the decrees should be reversed on the ground that the pretended arrangement between the consignees and the Terminal Association, which counsel for the Receiver stated he *expected* to prove, became effective immediately upon the cars being placed on the tracks which the Receiver used under his agreement with the Terminal Association; that as soon as the cars were so placed on these tracks that association should be deemed as holding them, notwithstanding there had been no delivery of them in the usual and customary way that deliveries were made at that place by the Receiver to the Terminal Association, and that this would be true although the Terminal Association had no knowledge of the destination or consignee or contents of the cars. (Rau Rec., 344.)

Judge Jenkins dissented from these opinions, holding that the decrees of the Circuit Court should be affirmed. In commenting upon the opinion of Judge Woods, the presiding judge, he says:

"I am unable to concur in this conclusion. I have sought to show that there had been no delivery of these cars to the Terminal Association. It had not knowledge of their destination. It had not knowledge of the consignee of them. They were subject to the direction and control of the Receiver. The Terminal Association under its contract with the Receiver had placed these cars upon these tracks for the Receiver and for a compensation agreed upon. It therein was the agent of the Receiver. It could not know whether these cars were to be transported over its line or the lines of the Wiggins Ferry Company. It could not know in what direction they were to be transported, or their ultimate destination. When it had placed the cars on its track pursuant to its contract with the Receiver, it had nothing further to do with them until the Receiver had dispossessed himself of possession and control and had invested the Terminal Association therewith. I cannot comprehend that

the general agreement between the Terminal Association and consignees can become operative with respect to the contents of these cars until delivery to the Terminal Association and it had been invested with the exclusive possession and the exclusive control of them. The force of the reasoning is not perceived whereby it is held that because in fact these goods were ultimately to go to persons who had contracted with the Terminal Association—of which contract Receiver had no knowledge—therefore these goods were held under that contract before delivery in fact to the Terminal Association and before it was invested with exclusive control of them. * * * The question here is, whether the Receiver is absolved from liability; whether failing a delivery of the cars to the Terminal Association, failing a surrender by the Receiver of control over them, with ignorance upon the part of the Terminal Association of their destination or their consignees, the agreement between the Terminal Association and the consignee had not become operative in respect to these goods. I think not. If the Receiver had directed that the Terminal Association under its contract with him should transfer these goods to the Wiggins Ferry Company, his order must have received recognition and have been carried out by the Terminal Association, and it cannot be doubted that up to the time of the fire in question the goods were so subject to the Receiver's direction and control. For these reasons I think that the decrees appealed from should be affirmed." (Rau Rec., 354.)

Assignment of Error.

The court below erred in holding that the Receiver had delivered the cars in controversy to the Terminal Association, and that that association was holding them at the time they and their contents were destroyed by fire.

ARGUMENT.

I.

Circuit Judge Showalter, in his opinion, holds that the act of the Terminal Association in switching the cars from the Receiver's main track to the track which he used under his agreement with that association constituted a delivery of the cars by the Receiver to the Terminal Association, and that a delivery of the customary way-bill was not necessary to a delivery of the cars. This holding, we submit, is not only utterly opposed to the custom under which deliveries of cars were made by the Receiver to the Terminal Association at East St. Louis, as disclosed by the undisputed testimony, but is in conflict with the decision of this and other courts.

There is no dispute in the testimony as to the custom under which deliveries of cars were made at East St. Louis by the Receiver to the Terminal Association. This custom was that a car was never treated as delivered until a way-bill therefor had been passed to the Terminal Association. It is apparent to anyone who is at all familiar with the transportation business of the country that this must, in the very nature of things, be the custom and practice, for it can readily be seen what confusion and delay would arise in the interchange of traffic in car-loads between the various railway companies if each company should, upon the arrival of cars at the terminus of its line of road, or at such other place where delivery is made to the next succeeding carrier, claim that it had made a delivery by merely placing or causing cars to be placed upon certain

tracks without notifying such succeeding carrier, either by way-bill or otherwise, of the delivery, or giving any instructions or directions for their further transportation. It is clearly apparent that without such a way-bill, or something that is its equivalent, the succeeding carrier would not know what disposition to make of the car. It would not know its contents, its route or destination or the party to whom it should be delivered, neither would it have any data upon which it could make a charge for transporting it. All this information is withheld by the preceding carrier, in this case the Receiver, until the customary way-bill is delivered, and so long as it is withheld from the succeeding carrier there cannot, in the very nature of the transaction, be a delivery of the property to which such information applies. It is to the interest of both shippers and carriers, as well as to the commerce of the country generally, that there should exist no doubt as to what constitutes a delivery of property in course of transportation, as between connecting carriers.

That cars were never treated as delivered to the Terminal Association until the Receiver had delivered way-bills therefor is clearly shown by another circumstance which the undisputed testimony discloses, which is that whenever the Receiver delivered cars to that association, if such cars belonged to some other company, his car accountant immediately on the very day of the delivery of way-bills therefor, *and not until then*, reported to the company owning the cars the fact that certain of its cars, giving their numbers, had on that day been delivered by the Receiver to the Terminal Association. This was the practice at East St. Louis as well as at all junction points. (Rau Rec., 80, 81, 82, 87, 88, 96, 138, 139, 140, 227.)

These reports are called junction reports, and by means of them each railway company is advised of the whereabouts of its cars when they are out of its possession. Mr. Beecham, car accountant of the Chicago, Milwaukee and St. Paul Railway Company, and Mr. Bradley, the Receiver's car accountant, both testified that the Receiver had not reported any of the cars in controversy as having been delivered to the Terminal Association. (Rau Rec., 89, 96, 139, 140.) This was because no way-bill had been delivered by the Receiver to the Terminal Association of any of the cars of barley in controversy. And in this connection the attention of the court is called to the significant fact that prior to and up to the time of the fire, whenever the Receiver delivered a way-bill to the Terminal Association, at the same time such way-bill was delivered, he caused to be sent by his car accountant to the car accountant of the company whose cars were delivered, by such way-bill, such junction report, advising that company of the delivery of the car named in such way-bill to the Terminal Association, *and not until a way-bill had been delivered for such car was that car reported delivered to that association.* So that a junction report and a way-bill went hand in hand with every car that was delivered by the Receiver to the Terminal Association. For example: Mr. Felps, the agent of the Terminal Association, testified (Rau Rec., 78, 79) that on the 28th day of October, the day of the fire, the Receiver delivered three cars of the Chicago, Milwaukee and St. Paul Railway Company, Nos. 2,100, 31,872 and 16,562, to the Terminal Association by delivering way-bills therefor. By referring to the testimony of Mr. Beecham (Rau Rec., 90, 91, and Exhibit "E," Rau Rec., 117), it will be seen that

on the very day the way-bills for these three cars were delivered to the Terminal Association, the Receiver's car accountant reported these three cars as having been delivered on that day to the Terminal Association.

Now, what does Mr. Felps say he did immediately upon the receipt of the way-bills for these three cars?

Q. What did you do after receiving these way-bills with respect to those cars?

A. Cars carded out as usual to their proper connections or destinations.

Q. Following the directions of the way-bills?

A. Yes, sir; in accordance with the instructions.

Q. Was the service rendered by the Terminal Association, in breaking up of the train of the receiver when it came in on the "Y," and placing the cars on these tracks marked red, a separate and distinct service from the work you did after receiving the way-bills?

A. It was a separate and distinct service.

Q. Explain how and why?

A. We received for this service, taking care of the cars for which we had way-bills, a separate revenue.

Q. Separate from what?

A. From making and breaking up trains. (Rau Rec., 79.)

By an examination of the testimony it will be seen that in every instance the Receiver did not report a car as having been delivered to the Terminal association until he had delivered a way-bill therefor to that association.

This custom is in accord with the views of text writers and the decisions of the courts. Ray, on Freight Carriers, 388, says:

"The placing of a car by an initial carrier on the side track of a connecting carrier, without giving the latter any notice and without marking it with the name and address of the consignee, *or sending any way-bill or shipping directions*, does not establish the relation of common carrier between the initial and the connecting carrier."

The following cases hold the same rule:

Tex. & Pac. Ry. Co. v. *Clayton*, U. S. C. C. A., 2nd Cir., 51 U. S. App., 676; s. c., 84 Fed. Rep., 305.

Mt. Vernon Car Co. v. *Ala. G. S. Ry. Co.*, 92 Ala., 296.

Ins. Co. v. *Ry. Co.*, 55 Tenn. Repts., 268.

Palmer v *Pa. Co.*, Conn. Sup. Ct., 13 Atl. Rep., 818.

In *Mt. Vernon Car Co.* v. *Ala. G. S. Ry. Co.*, *supra*, the court say:

"The same rule is applicable in the case of connecting carriers; the responsibility peculiar to the common carrier is not devolved on the next connecting carrier until the receiving carrier has delivered the goods to the former *with directions for their shipment, the place of destination and to whom consigned. Until this is done the relation of common carrier is not established between the shipper and the connecting carrier.*"

In *Texas & Pacific Ry. Co.* v. *Clayton*, *supra*, the question of delivery between connecting carriers was discussed by Circuit Judge WALLACE. He says:

"It may be safely affirmed, as a proposition applicable to all cases, that a deposit of the goods with notice, express or implied, at any place where the second carrier has control of them, conformable with usage created by the course of business between the two carriers, is a sufficient delivery, and discharges the first carrier. The liability of the second carrier begins when that of the first ends. * * * In the present case the cotton had never been placed within the control of the steamship line of the defendant. * * * Before the steamship line could have identified it for the purpose of removal, and after that, before they could have exercised any control over it, the co operation and assistance of the defendant were necessary."

So here the Receiver, up to the time the cars of barley

were destroyed, had full control over their further movement. He so testified. (Rau Rec., 228.) For without the information which would be conveyed by the delivery of the customary way-bill, the Terminal Association could not identify them for further transportation, neither could it transport them, as it had no knowledge concerning their contents, their route, destination or consignee. This information was all with the Receiver, and until he imparted it to the Terminal Association by the delivery of the customary way-bill, that association could exercise no control over the cars in the way of their further transportation.

These decisions are all in harmony with the rule of this court announced in *Pratt* v. *Grand Trunk Ry. Co.*, 95 U. S., 43, cited by Circuit Judge Jenkins in his dissenting opinion. In this case the freight in controversy was *package* freight. Something more is required in making a delivery of a car loaded with merchandise from one carrier to another, than is required in making a delivery of package freight. The package is addressed, and the receiving company can readily ascertain from the package itself the consignee and destination; but a freight car has no marks nor address upon it showing the consignee, route or destination. This information is only found in the way-bill, and until that is delivered there cannot, in the very nature of things, be a delivery of the car.

The Terminal Association, in switching the Receiver's cars from his main track and placing them upon the tracks which he had the use of under his agreement, did not thereby take possession of such cars or accept delivery of them as a carrier. Whatever possession it thereby had of the cars was under its agreement to furnish the Receiver the use of certain tracks in its yards for *his* cars, and to

switch *his* cars from his main line to certain other of *his* tracks. As between the petitioners and the Receiver, these tracks were his tracks and the switch engines his engines, as much so as if he had owned them outright. And the cars and the freight they contained while on these tracks were the Receiver's so far as handling and caring for them. The preamble of the agreement makes this plain:

"That, whereas, the party of the first part undertakes to give to the party of the second part (the Receiver) terminal facilities at East St. Louis for the handling of *its* (his) trains, care of *its* (his) engines and cars and the handling and care of *its* (his) freight, under the following terms and conditions."

While this agreement did not exclude the relation of connecting carriers as between the Receiver and the Terminal Association, neither did it change their relation. The same acts were required of the Receiver in making a delivery of cars to the Terminal Association as would have been required had there been no contract relations between the two and the Receiver had owned the necessary terminal facilities at East St. Louis. In treating the question as to what constitutes a delivery as between the Receiver and the Terminal Association, the agreement by which the Receiver acquired the use of certain terminal facilities at that point should be wholly eliminated and the case treated precisely as it would be treated if the Receiver had owned the terminal facilities which he used under his agreement with that association. Carriers cannot shift responsibilities by contracting with others to perform the duty incumbent upon them.

Covington Stock Yards Case, 139 U. S., 128.

R. R. Co. v. *Reich*, 32 S. W. Rep., 818.

It must, therefore, be regarded as a fact that the terminals which the Receiver used at East St. Louis were for all purposes, as between him and the petitioners, his terminals, and that the tracks, engines and the men employed about them in the handling of cars brought there by his trains were all his. So that when his trains arrived at East St. Louis, were broken up, and the cars placed on certain tracks which he had the use of, under his agreement, as between him and the petitioners, the engines and the cars doing this work were his, and the tracks upon which the cars were left standing until they were way-billed out were likewise his tracks. The case, therefore, stands as if the Receiver had, in fact, owned the terminals which he, in fact, used, and the trains had been broken up by his own switch engine and switching crew and the cars placed upon his own tracks. Had the Receiver owned the facilities which he had the use of and in fact did use under his agreement with the Terminal Association, no one would for a moment contend that the breaking up of his trains and placing the cars upon the tracks where they stood at the time of the fire constituted a delivery of them to the Terminal Association. And yet there is as much warrant for such a contention as there is to justify the claim which is now put forth, that he had delivered these cars and their contents to that association by simply having them switched from his main track to other of his tracks which he used in handling his business at East St. Louis. Up to the time that the Terminal Association took possession of cars under way-bills which had been delivered to it, it did nothing with them that the Receiver would not have done had these terminal facilities been his own. The Terminal Association therefore acted merely as the servant or agent of the Receiver in breaking up his

trains and placing his cars on certain tracks, for which it received from the Receiver fifty cents a car. *One railway company does not pay to another railway company fifty cents a car for the privilege of delivering cars to it.* And the fact that the Receiver under his agreement paid the Terminal Association fifty cents a car for breaking up his trains and placing them on these tracks shows conclusively that in doing this work it was not expected nor intended by either of the parties that a delivery was thereby made of the cars so handled to the Terminal Association.

And further: It is provided in the agreement between the Receiver and the Terminal Association under which the cars of the receiver were handled by that association at East St. Louis, as follows:

"Second: Cars made 'bad order' by and during the making up and breaking up of trains of the party of the second part (the Receiver), to be repaired by the party of the second part, and the party of the second part shall furnish its own car inspectors. All cars made 'bad order' outside of the *yards set aside for the use of the party of the second part* shall be repaired by the party causing the damage." (Rau Rec., 100.)

This is significant, for it proves beyond all question that the Terminal Association in handling the cars of the Receiver *acted as his agent and not as an independent carrier;* and that while the cars were being switched from the Receiver's main track to the tracks set aside for the use of the Receiver, and while the Receiver's cars were standing upon the tracks set aside for his use in the yards of the Terminal Association, they were in his possession and not in the possession of the Terminal Association for he was required to inspect and repair all cars made "bad order" while so being handled, or while

standing upon such track. *The cars in controversy at the time they and their contents were destroyed by fire were all standing in that portion of the yard of the Terminal Association which had been "set aside for the use of the party of the second part"* (the receiver). This fact is stipulated, subdivision 2 of stipulation (Rau Rec., 103, 104); and likewise indisputably appears from the testimony (Rau Rec., 75, 77).

This fact, in connection with the undisputed testimony in the case, that no way bill had been delivered to the Terminal Association for any of the cars and that the Receiver had not reported the delivery of any of the cars to the Chicago, Milwaukee and St. Paul Railway Company, the company owning them, proves conclusively that the cars at the time of the fire had not yet been delivered to the Terminal Association, and fully sustains the position of Circuit Judge Jenkins in his dissenting opinion.

II.

Circuit Judge Woods bases his conclusion that there had been a delivery of the cars and their contents to the Terminal Association wholly upon the statement of counsel for the Receiver, made at the conclusion of the hearing before the master (Rau Rec., 238-241), that he expected certain of the consignees to have been present and expected to prove by them that the Terminal Association had an arrangement with them by which it agreed to hold cars of barley on "*their tracks*" free of car service charges (meaning the tracks of the Terminal Aassociation) at East St. Louis, and give them other facilities in "*their yards*" at that place, and the consent of counsel for petitioners that the witnesses, if present, would testify substantially as counsel expected they would testify.

We feel that a wrong construction has not only been given to this statement, but an importance attached to it which is not warranted by the facts of the case, which are indisputably proven, and which we believe should be all-controlling in this case.

In considering the question of the delivery of freight as between connecting carriers when the same is in course of transportation, the rule that when possession is once proven to be in certain one of several carriers, the presumption is that such possession continues in that carrier until it is proven to be elsewhere, and that the burden is upon that carrier to show delivery, should not be lost sight of. And this burden is not met by offering proof that is conflicting or uncertain in its character or meaning, or proof that is susceptible of different constructions, theories and inferences. *The proof must be certain and convincing, and, taken as a whole, consistent with no other theory than that of delivery. This is the rule.* And it should be adhered to strictly in view of the other rule of the Federal courts, which is not the rule in most of the state courts, that the carrier in whose possession property is at the time of loss is alone responsible, and not the initial carrier, unless it is shown by clear and satisfactory proof that such carrier contracted for liability beyond its line; and such liability is never inferred from proof that is uncertain or doubtful.

Myrick v *R. R. Co.*, 107 U. S., 102.

The difficulties which beset shippers over several connecting lines of carriers, in case their property is lost, unless the rule that the carrier in whose possession the property is once shown to be shall show delivery by proof that is certain, clear and satisfactory, is strictly

enforced, is well illustrated in the case at bar. After a litigation lasting three years, the claimants are now advised by a divided court, each judge differing with the other, that they have been pursuing the wrong carrier. They have no contract with the initial carrier for a through liability; they made the best investigation they could, and after tracing the property into the possession of the Receiver, and being informed that the Receiver's agent at East St. Louis, under the direction of the Receiver, in making proofs of loss to the insurance companies concerning the destruction of the property involved in this litigation, stated under oath that the cars in question were standing on tracks that were used by the Receiver (Rau Rec., 88, 98, 163, 164); that no way-bill had ever been delivered by the Receiver to that association of any of the cars, although it was an invariable custom to do so when ever a delivery was made; *that the notices and directions in reference to the handling of the barley after it had reached East St. Louis, and while it was standing on these tracks, all passed between the consignees and the Receiver;* that the Receiver was required to inspect cars while they were standing on these tracks and to repair all cars made "bad order" while thereon, they naturally concluded that the Receiver had the possession of their barley at the time it was lost, and accordingly intervened, as they were solicited by the Receiver to do, in the foreclosure suit.

Returning to the proposition that possession of this property having been proven to be in the Receiver, the burden was upon him to show by proof that was clear and satisfactory that he had delivered it to the Terminal Association, let us briefly recur to what the testimony indisputably shows:

1. The Receiver had no terminal facilities at East St. Louis. He therefore contracted with the Terminal Association for the necessary yard room and track facilities, and switch engines and crews for the handling of his cars, making and breaking up his trains that arrived at and departed from that place, *and for storage room for a reasonable number of cars not exceeding one hundred and fifty at any one time.* Under this agreement, so much of tracks numbered from 40 to 50 as was necessary to give the Receiver storage room for 150 cars was, quoting from the second subdivision of the contract, "set aside for the use of the party of the second part"—the Receiver. And these were the tracks that were commonly and usually used by the Receiver for handling and storing his cars, and upon which they stood, after they had been switched from the Receiver's main track, until they were delivered to the Terminal Association by the switch engine of that association taking them off these tracks and placing them in its portion of the yard, and then taking them to destination, or delivering them to the Wiggins Ferry Company if they were routed by that line. (Testimony of Roeder, Rau Rec., 70, 72; Felps, 74; Lester, 175; Stapleton, 187; Calvert, 214.) To identify these tracks they were marked red on a plat introduced in evidence. All the cars in controversy were at the time of the fire standing on some one or more of these tracks. (Rau Rec., 76, 77.) *And it was stipulated by a written stipulation, signed by Receiver's counsel, that the cars in controversy at the time they were destroyed by fire were standing on the tracks that were commonly used by the Receiver under his agreement with the Terminal Association.* (Rau Rec., 104.) They were, therefore, in the Receiver's possession. The stipulation

concedes this. They were placed there and were standing there in pursuance of the aforesaid agreement between the Receiver and the Terminal Association. The Receiver had the same right to have them switched there and stored there as though the tracks were his and the engine which placed them there was his, for he contracted and paid for this right, and so long as he occupied no more than the allotted room—150 cars—he could have stored these cars there until the right to do so ceased with the expiration of the contract. At the time of the fire there were, all told, but seventy of the Receiver's cars on these tracks. (Rau Rec., 165, 168.) So that the Receiver had room to spare. Now, how can it be reasonably urged that these cars were not as much in the physical possession of the Receiver as they would have been had he owned the tracks outright on which they stood and the engine which switched them there?

If they were, then it necessarily follows that the Terminal Association was not holding them at the time of the fire, and therefore the arrangement which counsel expected to prove by certain absent witnesses, that it had agreed with the consignees to hold their cars on its ("*their tracks*,") free of car service charges, and give them other facilities in its ("*their* yards") had not yet become effective, for the cars were not in "*their yards*" nor on "*their tracks*," but were on the tracks of the Receiver. Let us recur to the statement which counsel made: It was that he *expected* to prove by certain witnesses that the Terminal Association had agreed to hold cars on "*their tracks*" free of car service charges at East St. Louis, and offered other facilities in and about "*their yards*" at that place. Appellees' counsel admitted that if the witnesses were present they

would testify substantially as counsel stated he *expected* they would testify. (Rau Rec., 238-240.) We at that time had no thought, and not until it was argued in opposing counsel's brief on these appeals did it ever occur to us, that it could or would be contended that this informal stipulation, made in the hurry of and for the purpose of expediting a hearing, would or could be construed in such a manner as to cover cars *while they were yet standing and being held on tracks used by the Receiver, under his agreement with that association, and when they had not been way-billed to that association and it did not know and could not know until such way-bill had been delivered that the cars contained barley, or what they contained.* ESPECIALLY WHEN THE RECEIVER'S AGENT HAD, BEFORE THIS STATEMENT OF COUNSEL HAD BEEN MADE, TESTIFIED POSITIVELY, AND AT THE INSTANCE OF COUNSEL FOR RECEIVER, THAT THESE CARS WERE HELD BY THE RECEIVER ON THESE TRACKS ON ORDERS PLACED WITH HIM BY THE CONSIGNEES TO HOLD THEIR BARLEY. (Rau Rec., 1:0.) We supposed, and we submit any counsel would reasonably have supposed under like circumstances, that this statement of counsel related only to cars *after* they had been delivered by the Receiver to the Terminal Association in the usual and customary way in which deliveries were made at that place, so that it could be said that the cars were standing on "*their tracks*" in "*their yards.*" We did not suppose that it would or could be construed to apply to cars while they were standing on tracks which the Receiver was using under his agreement with that association, made for no other purpose than to give him track and yard room for handling and storing *his* cars, or to cars while they were being held on such tracks on orders

placed with the Receiver's agent by the consignees to hold their barley. (Rau Rec., 190.)

The holding of Circuit Judge Woods that the supposed arrangement between the consignees and the Terminal Association had become effective as to the cars of barley in controversy, notwithstanding there had been no delivery of them by the Receiver to the Terminal Association and notwithstanding the receiver still had the control and direction of them, and notwithstanding the Terminal Association had not up to the time they were destroyed knowledge of consignees, route, destination or contents of the cars, is, we submit, completely and conclusively answered by Circuit Judge Jenkins in his opinion. We quote from that opinion:

"It is held by the presiding judge that by reason of a certain supposed agreement between consignees in St. Louis and the Terminal Association—to the effect that the latter, as an inducement to barley dealers to ship over its lines, would hold cars containing shipments to such consignees on the tracks of the Terminal Association at East St. Louis—the Receiver was absolved and liability under such agreement imposed upon the Terminal Association so soon as these cars had under the contract with the Receiver been placed upon the tracks designated for the accommodation of the Receiver's cars. I am unable to concur in this conclusion. I have sought to show that there had been no delivery of these cars to the Terminal Association. It had not knowledge of their destination. It had not knowledge of the consignees of them. They were subject to the direction and control of the Receiver. The Terminal Association under its contract with the Receiver had placed these cars upon these tracks for the Receiver and for a compensation agreed upon. It therein was the agent of the Receiver. It could not know whether these cars were to be transported over its line or the lines of the Wiggins Ferry Company; it could not know in what direction they were to be transported or their ultimate destination. When it had placed the cars on

these tracks pursuant to its contract with the Receiver it had nothing further to do with them until the Receiver had dispossessed himself of possession and control and invested the Terminal Association therewith. I cannot comprehend that the general agreement between the Terminal Association and consignee can become operative with respect to the contents of these cars until delivery to the Terminal Association and it had been invested with the exclusive possession and the exclusive control of them. The force of the reasoning is not perceived whereby it is held that because in fact these goods were ultimately to go to persons who had contracted with the Terminal Association—of which contract the receiver had no knowledge—therefore these goods were held under that contract before delivery in fact to the Terminal Association and before it was invested with exclusive control of them. I do not undertake to say that the Terminal Association may not be liable to the receiver for its negligent acts causing the fire whereby this property was destroyed. Neither the question nor the party is before us. The question here is, whether the receiver is absolved from liability; whether, failing a delivery of the cars to the Terminal Association, failing a surrender by the receiver of control over them, with ignorance upon the part of the Terminal Association of their destination or their consignees, the agreement between the Terminal Association and the consignee had become operative with respect to these goods. I think not. If the Receiver had directed that the Terminal Association under its contract with him should transfer these goods to the Wiggins Ferry Company, his order must have received recognition and have been carried out by the Terminal Association; and it cannot be doubted that up to the time of the fire in question the goods were so subject to the Receiver's direction and control. For these reasons I think that the decrees appealed from should be affirmed."

2. That cars containing barley, after they were placed on these tracks and up to the time the Receiver had delivered to the Terminal Association the customary waybills for them, and that association had taken them off these tracks and placed them in its portion of the yard, as

testified by Felps (Rau Rec., 74, 75), they were held by the Receiver under an arrangement between him and the consignees, and not between them and the Terminal Association, there is no doubt under the testimony. For the Receiver's chief clerk, Stapleton, who was in charge of this business at East St. Louis under Calvert, the agent, testified, in response to questions asked of him by the Receiver's counsel, that after cars loaded with barley had been placed upon these tracks he would take the way-bills which came with the cars and notify the consignees that "*we*"—meaning the Receiver, not the Terminal Association—had a car, number so and so, loaded with barley, "Where do you want it?" and at such time as he—the consignee—got ready he would send the notice back, not to the Terminal Association, but to the Receiver's agent, to send the car to Hines' brewery, or Hiland or some other point. *Thereupon, and not until then, he, Stapleton, would make out a new way-bill for the car, deliver it to Felps, the agent of the Terminal Association, and take his receipt.* Now, why was this transaction? The following question and answer will explain:

Q. Was that a different and separate transaction, having reference to the original contract between the shipper and the Chicago, Milwaukee and St. Paul—*was it a new arrangement the consignee directed and controlled, or was it the original arrangement named by the shipper?*

A. *A new arrangement by the consignee, who placed orders with* us *to hold* his *barley.* (Stapleton's testimony, Rau Rec., 190.)

To the same effect is Calvert's testimony (Rau Rec., 216, 217, and Bosworth, receiver, 228).

What did Felps, the agent of the Terminal Association, do, upon receiving such way-bill from Stapleton, the Receiver's agent? This is his testimony, and it is uncontradicted:

Q. When you receive the way-bill of a car, what do you do then?

A. Card that car out and our yardmen are instructed to switch it out and deliver it according to the instructions.

Q. Does the way-bill contain the number of the car and destination?

A. Yes, sir; consignee, destination and route.

Q. *When you receive this way bill and switch the car out where do you take it?*

A. *Take the car out of* THEIR YARD, THEIR PORTION OF THE YARD, *and place it in the train in* OUR PORTION OF THE YARD, and take it to the connection or destination indicated.

Q. *What was the custom in respect to handling these cars set out on these tracks after they had been set there, on the part of the Terminal Association?*

A. *We had nothing to do with them at all until we received way-bills, if they stood there till doomsday.* (Rau Rec., 74, 75, 78.)

But if it is to be presumed, as it is by the opinion of the presiding judge of the court below, that Stapleton had sent to the consignee notices that the cars containing the barley in question had arrived, and asked them where they wanted them sent, then it must also be presumed that such notices were sent in pursuance of the arrangement which Stapleton says the consignees had with him to hold their barley until further orders. If this is true, then it also follows that this particular barley was not held by the Terminal Association under any arrangement which it had with the consignees to hold barley, but was held by the Receiver under the arrangement which he had with the consignees to hold their barley.

That this correctly states the case there can be no doubt, for it fully consists with the conduct of the parties in reference to this barley while it was standing on these tracks before way-bills had been delivered therefor. For

up to that time all transactions concerning it were had by the consignees with the Receiver; they treated the barley as in the Receiver's possession, and the Receiver regarded himself as having possession of it. The Receiver himself testified in response to a question asked by his counsel:

"Well, I would answer that by saying the St. Louis Terminal Association up to that point (meaning the time of the delivery of the way-bill) would not have recognized any order the consignee would have made directly to them, *and we would not have attempted to make a movement without the consignee*, WHO WOULD ORDER THROUGH OUR AGENT in East St. Louis. (Rau Rec., 228.)

What the Receiver did respecting the further transportation of this barley after receiving such orders from the consignees the following question and his answer thereto shows:

Mr. HANSON: And you would deliver to the terminal?

A. Yes, sir. (Rau Rec., 228.)

From this testimony of the Receiver himself it indisputably appears that until his agent at East St. Louis had delivered way-bills to the Terminal Association, that association would not recognize any orders of the consignees concerning this barley, and that he did not attempt to make a delivery of barley to the Terminal Association until he had received orders from the consignees to do so.

No orders having been received from the consignees respecting the barley in question, no delivery thereof was therefore made to the Terminal Association.

In view of such testimony and like testimony from his agent Calvert (Rec., 216, 217) and his chief clerk Stapleton (Rec., 190) that this barley while it was standing in

cars on these tracks before the delivery of way bills was held by the Receiver under an arrangement with the consignees, who placed orders with him to hold their barley for further orders, and that these further orders came directly to the Receiver from the consignees, except in occasional instances (Rau Rec., 192, 193) when they got into the hands of Mr. Roeder, a joint agent, who always turned them over to the Receiver's agent, how can it reasonably be contended that this barley was at the time it was destroyed in the possession of the Terminal Association, or was held by it under some arrangement made with the consignees for holding their barley on its tracks. Especially when there had been no delivery of it to that association, either actual or constructive, and when that association could not know and did not know what the cars contained until they were delivered to it in the usual manner by delivering the customary way-bill. *For, does not the testimony indisputably show that after the cars were placed on these tracks, and up to the time way-bills therefor were delivered to the Terminal Association, the Receiver held them on orders placed with his agent by the consignees to hold their barley for further orders, and that he delivered cars of barley to the Terminal Association only after having received orders from the consignees to do so.* THERE IS NO PROOF OF SUCH ORDERS HAVING BEEN RECEIVED. THE RECEIVER, THEREFORE, WAS HOLDING THIS BARLEY AWAITING THE ORDERS OF THE CONSIGNEES PURSUANT TO HIS ARRANGEMENT WITH THEM.

And further, the arrangement which counsel for Receiver stated he *expected* to prove by certain absent witnesses was that the Terminal Association agreed to hold the cars on its tracks free of car service. (Rau Rec.,

239.) The arrangement which the receiver proved he in fact had with the consignees was, to hold their barley at East St. Louis until they advised his agent at that place where in St. Louis they desired it sent · and when so advised, such agent would make out a new way-bill containing the name, number, contents, consigeee and destination of the car and deliver it to the Terminal Association, take his receipt therefor, and then report to the company owning the car the delivery of it to the Terminal Association. (Rau Rec., 190.) The arrangement between the Terminal Association and the consignees, by the terms of it, was effective only *as to cars that were held by that association on its tracks.* It was not intended to apply to cars that were held by the Receiver under his arrangement with the consignees to hold their barley awaiting their orders. The apparent purpose of the arrangement which the consignees had with the Terminal Association was to relieve the consignees from car service charges on such cars as the Terminal Association held on *its tracks;* such arrangement had no application to cars which the Receiver might hold on the tracks which he had the right to use, and in fact used under his agreement with that association, especially cars which were being held by him for the consignees, under an arrangement with them to hold their cars awaiting their orders. Besides the tracks upon which the cars in controversy were standing at the time of the fire were tracks which the Receiver used and had the right to use for storing his cars at the rate of one hundred and fifty cars at a time. These tracks were his tracks for such use, as much so as if he had owned them outright; and while his cars stood thereon, and until he had delivered the customary way-bill to the Terminal Association, and taken

the usual receipt therefor, they were standing on his tracks and not on the tracks of the Terminal Association, and were held by him under the arrangement which he had with the consignees to hold their barley, and not by the Terminal Association under its arrangement with the consignees to hold cars on its tracks free of car service. It would hardly be presumed that the Terminal Association after having granted the right to the Receiver to use certain of its tracks in its yards for storing his cars to the extent of one hundred and fifty at a time, would make an arrangement with other parties for the use of the same tracks at the same time for the storage of their cars free of car service. However viewed, it is apparent from the whole testimony in the case that the cars in controversy at the time they were destroyed were being held by the Receiver under his arrangement with the consignees to hold their barley awaiting their orders, and not by the Terminal Association, for they were not on its tracks, and the arrangement for free car service could not therefore apply.

Stated most favorably to the Receiver, the testimony which he *in fact* introduced in evidence, and the testimony which he stated he *expected* to introduce in evidence, proves, or tends to prove, that the consignees had an arrangement with both the Receiver and the Terminal Association for holding barley at East St. Louis. This testimony, if reconciled as it should be, can all be given effect; for it shows that the arrangement which the consignees had with the Receiver for holding their barley awaiting their orders was intended to apply while it was standing on the tracks which the Receiver used, between the time of its arrival at East St. Louis and the time when it should be way-billed over to the Terminal Association;

and that the arrangement they had with the Terminal Association to hold cars on "*their tracks*," free of car service, and for other facilities in "*their yards*," applied to cars of barley after they had come into the possession of that association in the usual and customary way, by the delivery of way-bills, and had been switched into "*their yard*" and were on "*their tracks;*" *or* to cars which the Receiver could not hold on his tracks by reason of the limited space which he had contracted for being fully occupied by other of the Receiver's cars. For the Receiver had storage room for only 150 cars at a time, and it may well be presumed that at times he did not have sufficient space to store all the cars which the consignees desired held at East St. Louis under their arrangement with the Receiver, and they, therefore, made an arrangement with the Terminal Association to store such cars as the Receiver had not room for "*free of car service.*" This court can very well see what is liable to confront these barley shippers if they shall be driven to sue the Terminal Association.

It is more reasonable, and certainly more in accord with the rules of evidence, to harmonize this testimony—all coming from the Receiver's witnesses—in this manner, than it is to eliminate from the case the testimony of Stapleton, Calvert and the Receiver himself, as would have to be done if the construction given by the presiding judge of the court below to the testimony which Receiver's counsel stated he had *expected* to introduce, is adhered to. Unless this testimony can be reconciled, as we think it can and should be, then it is in serious conflict, and the conclusion necessarily follows that the burden of proof which was upon the Receiver to show by clear and satisfactory evidence that he had made a delivery of these

cars and their contents before the loss occurred, has not been met. For the testimony of his witness Stapleton, that barley arriving at East St. Louis was held there by the Receiver up to the time it was way-billed out under "*a new arrangement by the consignee, who placed orders with us* (*the Receiver*) *to hold his barley*," as well as the testimony of Calvert and the Receiver, is absolutely inconsistent with the theory or claim that there had been a delivery of the barley and cars in controversy to the Terminal Association.

While on the other hand, if the arrangement which counsel for Receiver expected to prove by certain witnesses, that the Terminal Association had agreed to hold cars of barley for the consignee in *its yards* at East St. Louis, free of car service, is given the construction which is placed upon it by Circuit Judge Jenkins in his opinion, viz: that this arrangement was only intended to apply to cars loaded with barley, after there had been a delivery in accordance with the usual method of making deliveries of barley by the Receiver to the Terminal Association, and as explained by Felps (Rau Rec., 74, 75, 78), so that the cars were, quoting from counsel's statement, "*on their tracks*," it is then not only consistent with the arrangement under which the Receiver and his witnesses, Calvert and Stapleton, say the barley was held between the time of its arrival and the delivery of way-bills therefor to the Terminal Association, but is consistent with the custom which all the testimony shows prevailed at East St. Louis, that as between the Receiver and the Terminal Association a car was never treated as delivered until the Receiver had delivered to the Terminal Association the customary way-bill, containing the name of the consignor, consignee, destination, route, number and con-

tents of the car. And further, until the way-bill for a car had been delivered, and not before, did the Receiver notify the company whose car he had so delivered had been delivered to the Terminal Association. This is significent. For it shows that the Receiver regarded himself as having possession of the car up to the time that the way-bill therefor was delivered.

This interpretation of the testimony is likewise consistent with the construction which, we contend, should be given the contract under which the Receiver used the tracks of the Terminal Association, viz: that while his cars were standing upon the tracks which he contracted and paid for the use of, he was liable for all such cars as were made "bad order" while on such tracks, as much so as if he had owned the tracks absolutely. (Rau Rec., 100.) This fact of itself shows that the possession of such cars were with the Receiver.

And further, such interpretation is consistent with the stipulation of the parties, that the cars in controversy at the time of the fire were standing on the tracks which the Receiver had the use of under his agreement with the Terminal Association. (Rau Rec., 103.) This fact is likewise significant, for it shows conclusively that the very cars in controversy were in the Receiver's possession at the time of the fire, for they were at that time, and had been ever since their arrival at East St. Louis, standing on the tracks which the Receiver had the use of under his agreement. This agreement took the place of ownership, and possession under it was the same as possession with ownership.

We therefore submit that a wrong conclusion has been reached, that a wrong construction has been given to the statement of counsel for Receiver as to what he expected

to prove by certain witnesses—a construction that was not intended by the parties, a construction that petitioners should not be bound by in view of the testimony of witnesses for the Receiver, that the consignees had arranged with the Receiver to hold their barley upon its arrival at East St. Louis until further orders, and of the stipulation of the parties that the particular cars in controversy were at the time of the fire standing on the tracks which the Receiver had the use of under his agreement with the Terminal Association, a construction which raises a serious conflict between the testimony which counsel stated he *expected* to introduce, and the testimony of Stapleton, Calvert and Bosworth, which he *did* introduce in evidence—a construction which is far beyond that which petitioners' counsel ought reasonably to have expected in view of the testimony, which Receiver's counsel had introduced prior to the making of that statement, in reference to the arrangement which the consignees had with the Receiver for holding this barley, and the custom which all the testimony shows prevailed at East St. Louis, that a car loaded with barley, while standing on the Receiver's tracks, was never treated by the Receiver as delivered to the Terminal Association until his agent had delivered a way-bill for the car, taken the usual receipt therefor and the car switched from his portion of the yard. We feel also that Circuit Judges Woods and Showalter, in the consideration of these cases, have overlooked the well-established rule of law, that when possession of property is once proven to be in a carrier the presumption is that such possession continues until it is shown to be elsewhere; and that the burden is upon the carrier to show by a preponderance of proof—proof that is clear and satisfactory, not conflicting or as consistent

with non-delivery as with delivery—that there had been a delivery of the possession either to the consignee or the succeeding carrier, whichever the case may be. This proof, we submit, is not present in these cases. For if the construction which we are contending for is not to be given to the statement of counsel, then it is at war with the testimony of his other witnesses Stapleton, Calvert and Bosworth, as well as with nearly all the other testimony in the case which relate to the holding and delivery of cars loaded with barley at East St. Louis. A carrier upon whom the burden of proof rests to show delivery of property to a connecting carrier, especially in a suit by the owner to recover its value in case of loss, cannot and ought not to discharge that burden by testimony that is conflicting or is susceptible of two or more constructions, or is as consistent with non-delivery as with delivery

Such is the case here—if the construction which the presiding judge of the court below has given to counsel's statement is to prevail.

3. It is assumed by the presiding judge of the court below that the Receiver's agents at East St. Louis had sent to the consignees the usual notice of the arrival of the cars of barley in question. There is no proof to sustain this presumption, and the master found that no notice had been sent by the Receiver's agent to the consignees. (Rau Rec., 61.) But, conceding this to be true, then the other presumption inevitably follows, that such notice was sent in pursuance of the arrangement which Stapleton testified was "*a new arrangement by the consignee, who placed orders with us to hold his barley.*" (Rau Rec., 190.) This leaves no room for the contention that this particular barley at the time it was destroyed was

being held by the Terminal Association under an arrangement with the consignee. *For the fact that the Receiver's agent sent notices to the consignees that he had certain cars loaded with barley consigned to them, giving the number of the cars in controversy, asking them where they wanted them sent, and that this was done in pursuance of an arrangement between him and the consignee to hold their barley on their orders, placed with him, shows conclusively that the particular barley in question at the time it was destroyed was being held by the Receiver under his arrangement with the consignees to hold it, and not by the Terminal Association under its alleged arrangement with the consignees.* The presumption that the customary notices covering the particular cars of barley in controversy were sent by the Receiver's agent to the consignees, and that such notice was sent in pursuance of "*a new arrangement the consignee directed and controlled*"—"*a new arrangement by the consignee, who placed orders with us* (the Receiver) *to hold his barley*" (Rau Rec., 190 , precludes the claim that the barley in question was being held under any other arrangement than that testified to by the receiver's witnesses.

And further: Under the arrangement which the receiver had with the consignees for holding their barley, the receiver's agent at East St. Louis would send a notice to the consignees that he, the receiver, "*had a car numbered so and so loaded with barley—where do you want it?*" At such time as the consignees got ready they would send this notice back to the receiver's agent with a notation thereon to send the car or cars mentioned in the notice to Hines' brewery, or Highland, or some other point. Thereupon, the receiver's agent would make out the usual way bill and deliver it to the agent of the Ter-

minal Association. The Terminal Association would thereupon take this way-bill, locate the car or cars named therein, and then switch the same from the Receiver's portion of the yard to its portion of the yard, and at the proper time place them in its train and take them to the destination indicated on the way-bill. There is no proof, and it is not contended by the Receiver, that the consignees up to the time of the fire had given the Receiver any notice or directions concerning the further movement of this barley. Now, if it is to be presumed that the Receiver had given the consignees of this barley the customary notice, then it must also be presumed that such notice was sent in pursuance of the arrangement which the Receiver says he had with the consignees of holding this barley awaiting their orders for its further movement. This being so, and it being an invariable practice to make out and deliver to the Terminal Association a way-bill immediately upon the receipt of notices from the consignee as to where they wanted barley sent, *and no way-bill having been made out or delivered by the Receiver for any of the cars in controversy*, in the absence of proof to the contrary, it must be assumed that no directions had been given by the consignees to the Receiver in response to the notice which the presiding judge of the court below assumes the Receiver had given to the consignees of the arrival of the cars of barley in question. IT FOLLOWS FROM THIS THAT AT THE TIME OF THE FIRE THE CONSIGNEES HAD NOT YET DETERMINED UPON THE PLACE IN ST. LOUIS WHERE THEY DESIRED THEIR BARLEY SENT OR WHETHER THEY DESIRED IT SENT BY THE WIGGINS FERRY COMPANY OR THE TERMINAL ASSOCIATION, AND, THEREFORE, THE RECEIVER WAS HOLDING THIS BARLEY FOR THE CONSIGNEES, AWAITING THEIR ORDERS AS TO

WHERE IN ST. LOUIS THEY WANTED IT SENT AND BY WHAT ROUTE.

That the claims which the Receiver now puts forth are an after-thought is clearly shown by his action in presenting proofs of loss to the insurance companies. It appears from the testimony that Mr. Calvert, his agent at East St. Louis, by his direction, prepared a sworn statement showing the cars and the value of their contents, which were destroyed by fire, and presented that statement to the insurance companies for the purpose of collecting the insurance thereon, and so far as the record shows has collected such insurance. In that statement Mr. Calvert says:

"During the night of October 28, 1894, a fire occurred on the tracks of the Terminal Railway Association of East St. Louis, State of Illinois (said tracks being used by the Chicago, Peoria and St. Louis Railway Company), and burned the cars and wholly consumed the property and freight in transit in said cars, as set forth in the statements attached hereto and forming a part of this proof of loss" (*which statements contain a list of the cars in controversy*).

That this statement is true is shown by the undisputed testimony in the case. The tracks upon which the cars stood were the tracks which had been set apart for the Receiver under his agreement with the Terminal Association This affidavit shows, as does the whole testimony, that these cars, instead of having been delivered to the Terminal Association, were yet upon the tracks used by the Receiver, and therefore were in his possession, as much so as they would have been had the Receiver owned outright the tracks upon which they stood. It is likewise true, as stated by Mr. Calvert, that these cars were still in transit, as alleged in the intervening petitions and as shown by the testimony, as well as by the stipulation

of August 27, 1895, hereinbefore referred to; for all this property was consigned to St. Louis, Missouri (*it is so stipulated*, Rau Rec., 103, 106), and would have been transported there had it not been destroyed by fire.

Possession of the cars and barley having been shown to be in the Receiver, the burden rested upon him to show delivery either to the consignees or to the Terminal Association or the Wiggins Ferry Company, a competing line to St. Louis; and having shown that he had an arrangement with the consignees to hold their barley at East St. Louis while awaiting their orders for further transportation, and that under this arrangement he, the Receiver, had adopted the custom of notifying the consignees of the arrival of their barley at East St. Louis and they in turn would notify him when and where they wanted the barley delivered to them in St. Louis, the burden was upon the Receiver to show that he had sent the customary notices to the consignees of the arrival of this particular barley, before he could be heard to say that his liability as a carrier had ceased; and before he could claim discharge even from the liability as a warehouseman it was necessary for him to have shown that the consignees had given him orders to forward this particular barley to St. Louis, either by the Terminal Association or the Wiggins Ferry Company, and that in pursuance thereof he had delivered way-bills therefor to the transportation company designated. In other words, the Receiver having shown a custom of notifying the consignees of the arrival of their barley at East St. Louis, and holding such barley until he received orders from them to give directions for its further transportation, the burden was cast upon him to show that he had complied with such custom by giving the usual notices to

the consignees of the arrival of their barley, and not having shown that the usual notices were sent to the consignees, it must be presumed that none were given in respect to the barley in question. The master before whom these causes were tried found as a fact that the customary notice had not been given. The custom which the Receiver's agent at East St. Louis testified to (Rau Rec., 190), in respect to notifying the consignees of barley arriving at that point and of holding their barley awaiting the orders of the consignees as to further transportation of the barley, we submit is all-controlling in this case, for it determines where the possession of this particular barley was at the time it was destroyed by fire.

The whole conduct of the receiver in respect to this particular barley is inconsistent with any other theory than that he was in possession of it at the time it was destroyed by fire. The customary notices to the consignees not having been given, the customary way-bills not having been delivered the customary junction car reports not having been sent to the C. M. & St. P. Ry. Co., the owner of the cars which contained this barley, in connection with the fact that the cars containing this particular barley were all standing on tracks which had under the agreement been set apart for the use of the Receiver in the yards of the Terminal Association, and of the other fact that the Receiver in presenting his proofs of loss to the insurance companies included therein the cars and the barley in controversy, and as a part of such proofs of loss stated that the tracks upon which said cars stood at the time of the fire were the tracks used by him in the yards of the Terminal Association, and that the freight contained in said cars was in transit, prove conclusively that the cars and barley in controversy were in

possession of the Receiver at the time they were destroyed by fire.

We, therefore, respectfully submit that a wrong construction has been given the statement of counsel for Receiver, and a value attached to it that is not warranted by the testimony which the Receiver himself introduced. Either this is true, or the testimony which counsel expected to introduce is wholly inconsistent with the testimony which he did in fact introduce, in which event we contend that the burden of proof which was cast upon the Receiver was not met, and for that reason the conclusions of Circuit Judges Woods and Showalter are erroneous.

III.

THE RECEIVER HELD THE CARS AND THEIR CONTENTS AT THE TIME OF THE FIRE AS A CARRIER.

The cars and the barley they contained were still in transit. The Receiver, through his agent, Calvert, so declared when he presented his claims for damages arising out of this fire to the insurance companies. But, aside from this, the property was all consigned to consignees at St. Louis, Missouri, by way of East St. Louis; the stipulation of August 27, 1895, so states; it had not, therefore, reached its destination. And if the Receiver was holding this property, as we claim he was, at the time of the fire, he was holding it not for the purpose of making a delivery to the consignees at East St. Louis, but for the purpose of making a delivery of it to the Terminal Association, or The Wiggins Ferry Company to be taken to its destination and delivered to the consignees there.

The property having been consigned to St. Louis, a point beyond the end of the Receiver's road, the duty of the Receiver was when he received it into his possession at Peoria to carry it safely to East St. Louis, the end of his road, and there deliver it to the next succeeding carrier. The obligation to safely deliver these cars and their contents was just as imperative as the obligation to carry them safely, and until the Receiver had made such a delivery he held this property as a carrier. And although he held it awaiting directions of the consignees as to what place it should be taken to at East St. Louis, he held it as a carrier awaiting delivery, not to the consignees at East St. Louis, but to the Terminal Association, or the Wiggins Ferry Company for it to transport and deliver to the consignees at East St. Louis whenever they should give orders to the Receiver to deliver it to either one of said carriers.

The rule is well stated by Justice DAVIS in the case of *Ry. Co.* v. *Mfg. Co.*, 16 Wall., 318, and is pertinent here:

"If there be a necessity for storage, it will be considered a mere accessory to the transportation and as not changing the nature of the bailment. * * * It is argued, however, that there is no difference between goods to be delivered to the owner at their final destination and goods deliverable to the owner or his agent for further carriage; that in both cases as soon as they are ready to be delivered they are awaiting delivery. This position, although plausible, is not sound. There is a clear distinction in our opinion between property in a situation to be delivered over to the consignee on demand and property on its way to a distant point to be taken thence by a connecting carrier. In the former case it may be said to be awaiting delivery; in the latter case to be awaiting transportation."

Circuit Judge JENKINS in speaking of this phase of the case says (Rau Rec., 353):

"It will be observed that the transit of the barley was not ended upon the arrival of the cars at the end of the Receiver's line of road at East St. Louis. It was still to be transported over other and connecting lines to its destination. The barley was still in transitu. The record discloses that it was the custom of the receiver, with respect to goods consigned to the City of St. Louis, upon their arrival at East St. Louis to give immediate notice to consignees and take their directions to what part of the City of St. Louis the goods should be forwarded, and by what line—whether by the lines of the Terminal Association or by the lines of the Wiggins Ferry Company, two rival companies, whose lines of railway connected with the road of the Receiver. The master's report in the principal case states 'that no notice was sent to the owner, shipper or consignee of the arrival of said cars at St. Louis, or of the delivery of them to the terminal railroad.' The appellant has cast upon him the burden of showing that he has fulfilled his contract of carriage; that upon the arrival of goods, according to the custom of business, he had notified the consignees and taken their directions with reference to the further carriage of the goods. It is not shown that this notice was given, and the master reports that it was not."

See, also,

London v. *Ry. Co.*, 55 Mich., 218, 222.

Ill. Cent. R. R. Co. v. *Mitchell*, 68 Ill., 471, 477.

Bennett v. *Ry. Co*, 46 Mo. App., 657.

Irish v. *Ry. Co.*, 19 Minn., 379.

Mills v. *Mich. Cent. Ry. Co.*, 40 N. Y., 624.

Wehmann v. *Ry. Co.*, 59 N. W. Rep., 546.

Conkey v. *Ry. Co.*, 31 Wis., 624.

The authorities all hold that on shipments over connecting lines of the railroad a carrier's liability continues from the time it first attaches until the shipment reaches its final destination, and that no intermediate carrier holds the shipment as bailee, although there may be a delay in making deliveries between connecting carriers. In other words, the shipper's contract is for carriage, and until the goods reach their final destination he has a right to a continuous carrier's duty and responsibility, which cannot be changed to the duty and responsibility of a bailee or warehouseman.

IV.

IF THE RECEIVER DID NOT HOLD THE CARS AND THEIR CONTENTS AS A CARRIER, THEN HE HELD THEM AS WAREHOUSEMAN AND IS LIABLE AS SUCH.

That the Receiver was holding the cars in controversy under an arrangement with the consignees of the barley who had placed orders with him to hold their barley, is made certain by the testimony of Stepleton, his agent at East St. Louis. (Rau Rec., 190.) While holding this barley awaiting the orders of the consignees as to what point in St. Louis they desired it sent he was bound to exercise reasonable care in protecting it against loss or damage by fire. This point is raised by the amendment to the intervening petitions. (Rau Rec., 52.) Under the testimony which was given by witnesses on the part of the Receiver, the fact is indisputably proven that no care whatever was exercised by the Receiver or his employes in the care of this property, for it appears that the cars containing this barley were allowed to be placed about a wooden warehouse some six hundred feet in

length that was filled with hay, much of it loose and exposed to sparks which might be thrown upon it by every passing engine. This warehouse was open at its sides and ends and had two tracks passing through it lengthwise. The Receiver in his answer terms it "*a veritable fire trap.*" Rau Rec., 23.) The danger of fire was so patent that it had attracted the attention of Calvert, the Receiver's agent at East St. Louis. For his testimony, see (Rau Rec., 212, 214. Calvert's knowledge was the Receiver's knowledge. It matters not that this warehouse and tracks and engines did not belong to the Receiver. The negligence was in allowing these cars to be placed or stored upon tracks in close proximity to this long wooden warehouse filled with hay, a veritable fire trap, while he was holding them awaiting orders from the consignees. A fire starting in such a place was almost sure to get beyond control and result in great loss. All this could readily have been seen and was seen by the Receiver's agent at East St. Louis. A long wooden warehouse filled with loose hay exposed to the sparks of every passing locomotive is no place about which to stand cars loaded with valuable property.

Thomas v. *Ry. Co.*, 63 Fed. Rep., 200, is similar to this case. In that case cotton to the value of $85,000 was left in a position where it was exposed to sparks from passing steamboats, and also in close proximity to the tracks of the Illinois Central Rail Road Company. It was supposed that the fire originated either from sparks from the boats on the river or from the engines of the Illinois Central Company. The cotton at the time it was destroyed was in the possession of the Wabash Railroad. The court held that company liable on the ground that it was negligent in leaving the cotton in a place where it was exposed

to fire. In passing upon the question, ALLEN, District Judge, says:

"A position more exposed to sparks from the numerous vessels in a busy harbor, and from the smokestacks of the engines almost constantly passing on the railroad, could not have been chosen in Cairo, and it was at this exposed point that the barge containing the cotton was moored till it was destroyed by fire on the 28th of December. The fire originated most likely from sparks emitted from boats on the river or engines on the levee. It is not mere delay, therefore, but negligent delay in a dangerous place, willful it may be said, and deliberate exposure of the cotton to danger from fire that fixes the liability of the carrier. The danger could have been foreseen—should have been foreseen and guarded against."

The judgment in this case has recently been affirmed by the Circuit Court of Appeals for the Seventh Circuit, reported in 19 C. C. A., p. 90.

See, also,

Dodd v. *Ry. Co.*, 27 S. W. Reptr., 227.
Tanner v. *Ry. Co.*, 15 N. E. Reptr., 79.
Gregg v. *Ry. Co.*, 147 Ill., 555.

Circuit Judge JENKINS, in passing upon this phase of the case in the court below, says:

"The appellant (Receiver) has cast upon him the burden of showing that he has fulfilled his contract of carriage; that upon the arrival of goods, according to the custom of business, he had notified the consignees, and taken their directions with reference to the further carriage of the goods. It is not shown that this notice was given, and the master reports that it was not. This phase of the case, however, need not be dwelt upon; for, assuming that notice had been given, and no instructions received within a reasonable time, the liability of the Receiver as a common carrier was discharged, but liability as warehouseman was assumed. *The goods were still in his custody and under his control. They had not been delivered to the Terminal Association for further carriage*

or for any other purpose. The cars were placed upon the tracks designated as the yard tracks of the Receiver, and were there for his accommodation. The Terminal Association had no control over them. It was not advised of the destination of those cars, or of the consignees. Until such advice, it could not rightfully take possession of them, nor rightfully transport them, nor safely deliver them. They might be for transportation over the Wiggins Ferry Company, its rival; and the Terminal Association was bound by its contract with the Receiver to furnish switch engines for the transportation of those cars, and their delivery to the Wiggins Ferry Company, when so ordered. If, in the case supposed, the Receiver held them merely as warehousemen, he is still liable, for his answer asserts that the cars were placed in close proximity to a '*vertiable fire trap*'; *so that, whether the Receiver is to be regarded, with respect to his obligation, as insurer or as warehouseman of these goods and these cars, he is liable for their destruction.*"

V.

IT WAS CONTENDED BY THE RECEIVER IN THE COURT BELOW THAT UNDER THE "STATION RECEIPTS" WHICH WERE PUT IN EVIDENCE HIS LIABILITY AS A COMMON CARRIER OF THE BARLEY TERMINATED UPON THE ARRIVAL OF THE CARS AT EAST ST. LOUIS.

This claim has no support in this case either in fact or in law.

1. It appears from the testimony (Rau Rec., 257, 258, 259, 264, 265, 266), and the master so found (Rau Rec., 59), that neither station receipts nor bills of lading were given for these shipments at the time they were received by the railway company, but that long afterwards —after the property had been destroyed—the shippers applied to the railway company for such station receipts

for the purpose of presenting their claim for the loss which they had sustained in order to satisfy the Receiver that the property destroyed had been delivered for transportation. These shipments were not, therefore, made under station receipts or bills of lading, and the limitations on liability therein do not apply.

"After the goods are shipped it is too late to impose upon the shipper a clause exempting the carriers from liability for loss by fire after such fire has occurred."

Lamb v. *Camden & A. A. Co.*, 4 Daly, 483.

2. The station receipts, so for as they attempt to limit the liability, have no binding force upon the shippers. The undertaking on the part of the Receiver to the shippers was to transport this property from Peoria to East St. Louis, the end of its line, and there deliver it to the next succeeding carrier for it to take to destination and there deliver it to the consignees. The undertaking on the part of the Receiver to deliver this property to the Terminal Railroad Association or to the Wiggins Ferry Company was just as imperative as was the undertaking to safely carry it from Peoria to East St. Louis. The remarks of Justice Field in *Ry. Co.* v. *Bank*, 123 U. S., 733, are pertinent here:

"There are no conditions which would release him from this duty (*i. e.*, the duty of delivery) except such as would also release him from the safe carriage of the goods. The undertaking of the carrier to transport the goods necessarily includes the duty of delivering them."

And the Supreme Court of the United States in *Railroad Co.* v. *Mnfg. Co.*, 16 Wall., 324, has held, and the doctrine of this case has repeatedly been affirmed by this and other courts, that stipulations contained in bills of

lading or receipts limiting the carrier's liability, which receipts or bills of lading are unsigned by the shipper, are not binding upon him, although he accepts them without dissent. The court say:

"Every intendment should be made in favor of the shipper when he takes a receipt for his property with restrictive conditions annexed and says nothing, that he intends to reply upon the law for the security of his rights."

3. These shipments were all made from Iowa, Minnesota and Wisconsin, and the statute law of those states, if any, will control; for whatever the contract was for these shipments, it must be construed with reference to the statute law of the states where the shipments were made. The statute of Iowa, section 1308, Revised Statutes of 1888, provides as follows:

"No contract, receipt, rule or regulation shall exempt any corporatien engaged in transporting persons or property by railway from liability of a common carrier or carrier of passengers which would exist had no contract, receipt, rule or regulation been made or entered into."

There is no statute in either Minnesota or Wisconsin. The common law is therefore to be applied on all shipments from those states; and the decisions of the Supreme Court of the United States will control as to what the rule of the common law is on the subject; for that court has held that on questions relating to mercantile and commercial law it will not be bound by the decisions of the courts of the state, but will exercise its own judgment.

Liverpool Steam Co. v. *Ins. Co.*, *supra.*
Myrick v. *R. R. Co.*, 107 U. S., 102.
R. R. Co. v. *Mfg. Co.*, 16 Wall., 318.

This court has held in *Liverpool & Great Western Steam Co.* v. *Ins. Co.*, 129 U. S., 397, 445, it to be the settled doctrine that the courts of the United States will take judicial notice of the laws of the several states of the Union as domestic laws. As to the shipments from Minnesota and Wisconsin, there being no statute on the subject, we will have to look to the decisions of the Supreme Court of the United States for the rule of law which should be applied in determining whether it is competent for a common carrier by a mere receipt or bill of lading, *unsigned by the shipper*, to relieve itself from the obligation which the law casts upon it to carry safely to the end of its line and there safely deliver to the next succeeding carrier if the property carried is consigned to a further point. That court has not left the question in doubt, for it is expressly held in the case of *Ry. Co.* v. *Mfg. Co.*, above cited, as well as in other cases, that a carrier cannot limit its common law liability.

4. And further, under the law a public carrier is bound to receive and carry and deliver safely all property which he holds himself out as carrying in consideration of the payment of the reasonable and usual compensation therefor. This obligation the carrier cannot relieve himself from, either by contract or otherwise, *unless the contract or agreement of shipment by which he seeks to discharge himself from such obligation is based upon a proper and adequate consideration.* A contract of this kind, like all other contracts, must have a consideration in order to be valid and binding, as will be seen by the case of *Hart* v. *Ry. Co.*, 112 U. S., 331, and other cases decided by this court.

In *Wehmann* v. *Ry. Co.*, 59 N. W. Reptr., 546, it is held to be the duty of a carrier receiving goods for car-

riage to carry them to the end of its line and there deliver them to the next carrier; that a stipulation that a common carrier shall be exempt from any of its common law liability needs a consideration to make it binding, such as a concession in rates or other like consideration and that a concession in rates will not be presumed as such consideration where such abatement is forbidden by law. *There was no concession of rates made to the shippers in this case; they paid the regular established rates, the same as was charged by the railway company and paid by all shippers.* (Rau Rec., 261, 262, 264.)

5. The testimony of the shippers shows that they did not consent, or do anything from which their consent could be implied, to any restrictions or limitations on the common law liability of the carriers, and that they delivered their property to the railway company to be transported by it and the succeeding carriers to St. Louis and there delivered to the consignees, without asking any concession in the transportation charges and without any limitation of the liability of the carriers, relying upon the law for the security of their rights. The shippers testified that they had no knowledge whatever of the contents of the station receipts which were supplied long after their barley had been destroyed, or the rules and regulations on the back of them, and were not aware that there was anything contained in them which relieved the carriers from liability in case their property should be destroyed by fire.

VI.

OWNERSHIP OF THE BARLEY.

In the *Rau* case it is not disputed but that the ownership of the barley was in the petitioner at the time it was destroyed by fire. It is, however, contended by the Receiver that in the Huntting Elevator case the barley belonged to the consignee, the Teichman Commission Co., of East St. Louis, at the time it was destroyed by fire. At the commencement of the testimony before the master it was stipulated that the barley at the time it was destroyed by fire belonged to the Huntting Elevator Company. Later on in the proceedings, the court released the Receiver from the effect of this stipulation, and thereupon testimony was taken concerning the ownership of this barley. In respect to the ownership of the barley in the Huntting Elevator case, it appears that the Teichman Commission Co. made a bid of "56 net" on 5,000 bushels of barley, which was accepted; and another bid of "56 net" on 10,000 bushels, which was accepted; and in another telegram, the Huntting Elevator Company wired Teichman Commission Co.: "Please wire us best offer on 10,000 or 20,000 of our No. 3 sample barley, delivered St. Louis"; and the answer came back, "54 net," and the barley was sold. (Rau Rec., 294–302.) The Huntting Elevator Company paid all the freight charges on these shipments to St. Louis. That both parties treated these sales as a sale of barley to be delivered at St Louis clearly appears from their subsequent acts when the Teichman Commission Co. learned that a portion of the barley had been destroyed by fire. Immediately upon being notified of the fire the commission

company wrote the Huntting Elevator Company, under date of October 29, 1894, that there was a fire in the East St. Louis yards, and said: "We think likely some of *your barley* was amongst the cars destroyed." And later on when it was learned that some of the barley had been destroyed, the commission company wired the Huntting Elevator Company that all barley destroyed must be replaced; and immediately the elevator company wired back: "Will replace the barley." And the testimony and correspondence shows that the elevator company shipped other barley equal in quantity to that destroyed by fire to replace the barley so destroyed, in order to complete the sale which it had made to the Teichmnn Company of a certain amount of barley. (Rau Rec., 299, 300.) The president of the elevator company testified as follows:

"We shipped other barley to fill the sale.

Q. Why was this done?

A. We had made a sale of a certain amount of barley deliverable at St. Louis; the barley was not delivered and we supplied the deficiency.

Q. And so the subsequent shipment of barley was made in pursuance of a contract which you had with Teichmann Commission Co. to deliver to them at St. Louis a certain quantity of barley at certain prices?

A. Yes, sir." (Rau Rec., 295.)

The intention of the parties to a sale of personal property of course governs. The intention of the parties to this transaction is clearly apparent, and shows beyond all doubt that both parties treated this barley as belonging to the Huntting Elevator Company until it reached St. Louis, ready for delivery to the consignees there. The rule of law is tersely stated in the Am. & Eng. Ency. of Law, Vol. 21, p. 478, as follows:

"In determining whether title has or has not passed

by the contract, *the primary consideration is one of intention.* The agreement is what the parties intended to make it. If the intention is manifested clearly and unequivocally, it controls."

To this proposition the author cites cases from nearly all of the states as well as from the Federal courts. The rule everywhere is that *the intention of the parties must prevail.*

The master found that the petitioners were the owners of the barley at the time it was destroyed by fire (Rau Rec., 57, 58), and we submit that under the testimony it cannot seriously be claimed that they were not the owners of it.

VII.

THE CLAIM OF THE CHICAGO, MILWAUKEE AND ST PAUL RAILWAY COMPANY FOR CARS DESTROYED.

This claim rests on somewhat different grounds than do the claims for barley destroyed. Commercial necessities require that cars engaged in the freight carrying business of the country shall be exchanged between the various railway companies. This gives rise to a system of car bookkeeping between the companies, and the necessity for the rule, which all companies recognize and act under, that each company, upon making a delivery of a car not its own to a connecting line, shall report such delivery to the company owning the car, giving the number of the car, date of delivery and the company to which it has been delivered, and that until such delivery is so reported the car shall stand charged to the company last reported as having received it; and if destroyed while on the tracks of that company, such

company shall be liable therefor the same as it would be for any other property which it might have in its possession for transportation or delivery.

That this system of car bookkeeping and rule of liability prevailed between the Receiver's company and the Chicago, Milwaukee and St. Paul Railway Company there is no question under the testimony. Calvert, the Receiver's agent at East St. Louis, and Bradley, his car accountant, testified, as did Beecham, the car accountant of the St. Paul Company, to this system. (Rau Rec., 87, 89. 90, 91, 94, 139, 140.) The rule of liability for damaged or destroyed cars was testified to by both Mr. Beecham and Bosworth, the Receiver.

Mr. Beecham:

Q. Are you acquainted with the practice and custom which prevailed among the different railroads of the United States in respect to the settlement or payment for cars damaged or destroyed when in possession of companies not owning the cars?

A. Yes, sir.

Q. You may state what the practice or custom is.

A. The practice is for the company, through its master car-builder, for the companies on whose track the car is destroyed, to report such destruction to the owner of the car and to call for a history of the car, showing when it was built, and then they deduct a depreciation and salvage and settle direct with the owners of the car if they so elect, but they may—it is optional with them to rebuild the car.

Q. So the company in whose possession the foreign car is, in case that car is damaged or destroyed, either rebuilds the car or pays the company owning it?

A. That is the universal practice.

Q. Is that the way all settlements are made between different companies with respect to damaged and destroyed cars?

A. Yes, sir; it is.

Q. So that a car of the Chicago, Milwaukee and St.

Paul Railway Company, while in possession of the Chicago, Peoria and St. Louis Railway Company, if damaged or destroyed, the latter company would pay the St. Paul Company for it or rebuild the car?

A. Yes, sir.

Q. You say that is the custom and practice on which all settlements are made between the different companies?

A. Uniform practice and custom. (Rau Rec., 129.)

Mr. Bosworth:

Q. It is a custom between all railroads, if a car of the St. Paul Railway is destroyed on your track, that you pay for it?

A. Yes, sir.

Q. And that is on the ground that you have possession of the car, and in accounting for the loss of it you account to the owner and pay for it; that is a well understood custom, isn't it?

A. Yes, sir.

In this connection it should be stated that in pursuance of the custom which Mr. Beecham and Mr. Bosworth testified to, Mr. Bradley, the Receiver's car accountant, reported to Mr. Beecham under date of November 2, 1894, four days after the fire, the cars which had been destroyed by the fire belonging to the St. Paul Company (Rau Rec., 117, 118.) This is significant, for it shows that the car accountant regarded these cars as in the possession of the Receiver at the time they were destroyed and accordingly reported their loss to the car accountant of the St. Paul Company.

And by referring to the correspondence which passed between W. J. Hemphill, Receiver's superintendent, and J. N. Barr, suprintendent of the Chicago, Milwaukee and St. Paul Railway Company (Rau Rec. 123, 124, 125), it will be seen that, in pursuance of the practice above testified to, Suprintendent Hemphill reported to Superin-

tendent Barr a list of the cars destroyed in the fire and asked for certain information concerning them, in order that he might determine whether the Receiver should rebuild the cars or pay for the loss. This information was sent to him by Mr. Barr, as will be seen by his letter and statement enclosed, on pages 124, 125 of the record. This is significant and shows that the Receiver regarded the cars as in his possession.

There is likewise no dispute in the testimony concerning the possession of the particular cars in controversy. At the commencement of the taking of testimony it was formally agreed between the parties, by written stipulation signed and filed, that the thirty-eight cars in controversy were at the time of the fire standing on the tracks which the Receiver commonly used under his agreement with the Terminal Association. (Rau Rec., 103.) This puts at rest all questions concerning the actual possession of these cars. It should also be borne in mind that they they were not standing on these tracks for unloading there, but were awaiting orders for their further movement. The case, therefore, is not one where cars have been set on a private side-track of the consignee for unloading, in which event it might well be said they were not in the carrier's possession; but here they were in the Receiver's possession, on his tracks, awaiting further transportation. Besides this, it was an invariable rule for the Receiver to deliver to the Terminal Association a way-bill for every car delivered to that association. No way bill had been passed for any of the cars in controversy; no junction report han been sent to or received by the St. Paul Company for any of the cars. (Rau Rec., 90.) They all stood charged on the books of that company as being in the possession of the Receiver's Company.

Mr. Beecham testified:

Q. In whose possession were these cars I have spoken of—these thirty-eight cars—who were they charged to?
A. Chicago, Peoria and St. Louis Railroad. (Rau Rec., 93.)

The case, therefore, comes to this: That as between the Receiver's company and the St. Paul company, these cars were in the possession of the former company, and under the custom which had been established by long continued practice between the companies, it is liable for their value. If custom is to be considered in determining the liability for the contents of the cars, it should likewise be considered in respect to the cars themselves. And we submit that the testimony indisputably shows that the Receiver's company was a party to a custom or practice that fastens upon it a liability for these cars, and that it cannot evade that liability by showing that the consignees of the barley had arrangements with the Terminal Association for holding cars or giving them other facilities in its yards. Whether the Receiver's company knew of this arrangement is immaterial, so far as the rights of the St. Paul company are involved. It did know that these cars were on tracks which it had the use of, and that they were charged to it as being in its possession on the books of the St. Paul company. It, therefore, knew that under the rules and custom governing the exchange of cars between the various railway companies, that its liability for these cars would continue until it had made a delivery of them in the usual way that deliveries of cars were made at that place, and such delivery reported to the St. Paul company. Such delivery not having been made or reported, and the cars at the time of the fire being on tracks which the Receiver's company used under its agreement with the Terminal Association to give facilities for handling

and storing cars, it conclusively follows that the liability for these cars is with that company and not with the Terminal Association.

So far as the courts have had occasion to consider this question, they have held that a railway company is liable for the safe carriage and return of cars belonging to other companies which come into its possession in the usual course of business, the same as it is for any other property which it handles as a carrier or as a warehouseman. So long as cars of one company are in the possession of another company, that company is accountable for them as a carrier or as a warehouseman. If they have been set on a private delivery track belonging to the consignee, for loading or unloading, then they are not in the possession of the carrier, and consequently its liability is interrupted during the time they are so out of its possession (*Railway Co.* v. *Ry. Co.*, 123 Ill., 594); but if they are placed on the carrier's tracks for loading and unloading, the rule is different, and they will be regarded as in the possession of the carrier, its liability being that of a warehouseman only. (*Ry. Co.* v. *Rolling Stock Co.*, 136 Ill., 644.) We, therefore, come back to the question: Were these cars, as between the Receiver's company and the St. Paul company, in the possession of the former company at the time they were destroyed? If they were, then it is liable therefor, both under the rule of liability, which a long-continued practice and custom had created, and the decisions of the courts. We submit that, under the second subdivision of the stipulation of August 27, 1895 (Rau Rec., 103), and the rules and custom which prevailed between the two companies, under which deliveries of cars were made and reported and the accounts thereof kept, there can be no doubt as to where the possession of

these cars was at the time they were destroyed, or of the Receiver's liability.

The followeng cases bear upon this question:

Ry. Co. v. *Ry. Co.*, 109 Ill., 135.
Ry Co. v. *Ry. Co.*, 123 Ill., 594.
R. R. Co. v. *R. R. Co.*, 14 Allen, 462.
Ry. Co. v. *Rolling Stock Co.*, 136 Ill., 649.
Malory v. *Ry. Co.*, 39 Barb., 488.

VIII.

IN CONCLUSION.

This case could not be better stated in all its phases than is done in the dissenting opinion of Circuit Judge Jenkins, and it is urged upon this court to carefully examine and consider that opinion. It is in harmony with the case as presented by the record, it is in harmony with the succinct and able report of the master and the decrees entered thereon by Judge Allen at the Circuit, it is in harmony with the decisions of this and other courts, it is in harmony with the manifest justice of the case. The opinions of Circuit Judges Woods and Showalter are not only opposed to each other, but they are inconsistent with the decisions of this court, especially in the cases of *Pratt* v. *Ry. Co.*, 95 U. S., 43, and the Covington Stockyard case, 139 U. S., 128, and the decision of the United States Circuit Court of Appeals for the Second Circuit in *Texas & Pacific Ry. Co.* v. *Clayton*, 51 U. S. App., 676, and with the decisions of the state courts as announced in *Mount Vernon Co.* v. *Ala. G. S. Ry. Co.*, 92 Ala., 296, 298; *Palmer* v. *C. B. & Q. Ry. Co.*, 13

Atl. Rep., 818; *Ins. Co.* v. *Ry. Co.*, 55 Tenn. Repts., 268.

We submit that the reports of Mr. Stuart Brown, the master to whom these interventions were referred and the decrees of the Circuit Court entered thereon in favor of the petitioners, should be affirmed.

All of which is respectfully submitted.

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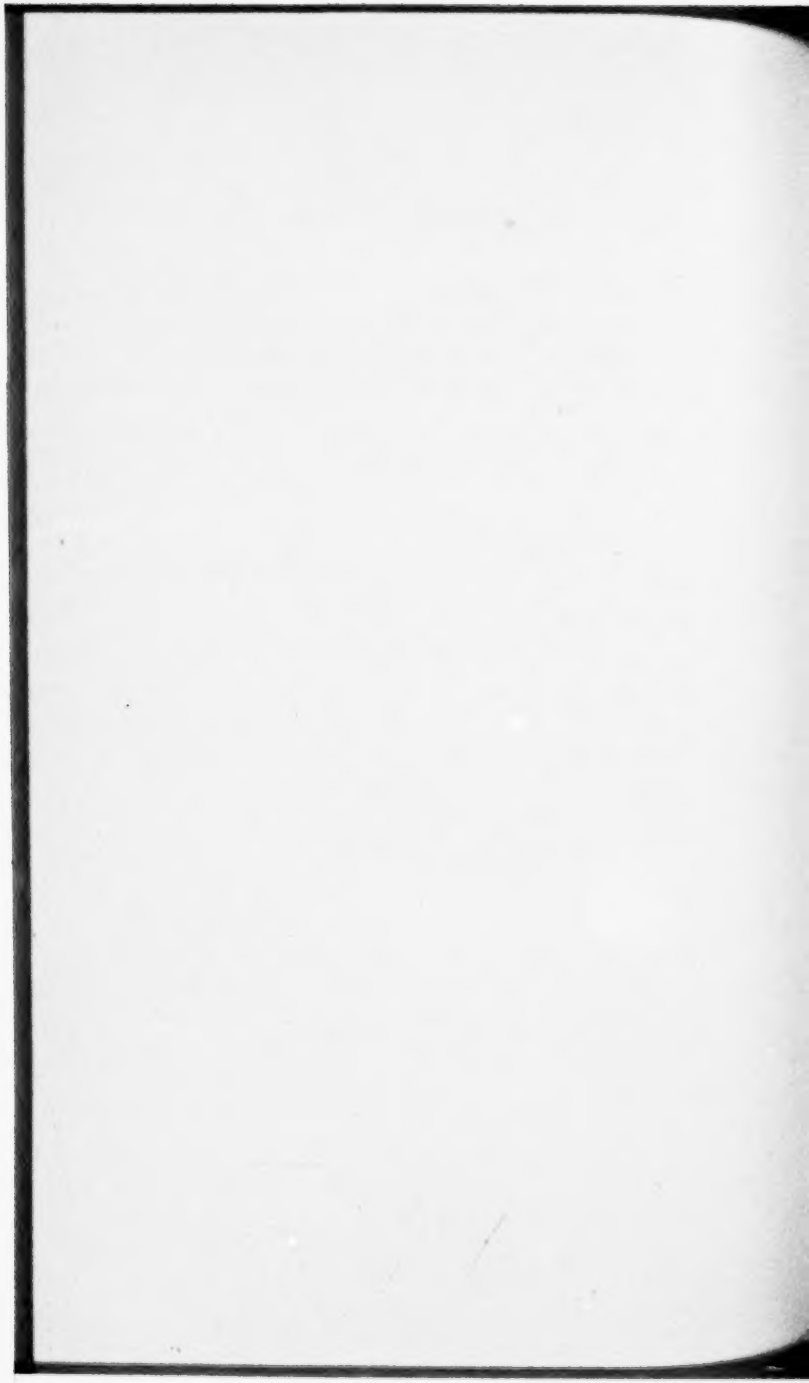

No. 13.

For other Crops herein
See No. 11 _ this volume.